Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

JAMES A. McNAMARA, JOHN J. SULLIVAN, THOMAS R. MILLER, CHARLES W. LUX, WILLIAM T. KING, CHARLES E. DINEEN, RICHARD A. GRAF, HENRY T. SCAVONE AND PAUL B. SOBCZAK,

Petitioners,

v.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a reverse discrimination case, isolated incidents of uncongeniality, remote in time, and unrelated to the decision-making process for hiring or promotion, justified promotion quotas for blacks and Hispanics in 1991-92 to the rank of captain in the Chicago Fire Department (CFD), especially in light of the following circumstances:

   A. the CFD has engaged in targeted recruiting of blacks and Hispanics since the 1960's;

   B. in lawsuits brought by the United States, there were prior judicial determinations of *no* discrimination in hiring and promotion;

   C. the CFD has voluntarily imposed both hiring and promotion quotas since the 1970's;

   D. there was adverse impact on *whites*, not blacks or Hispanics, on the 1987 captains' test at issue.

2. Whether the lawful remedy for isolated incidents of uncongeniality was to pass over innocent, third-party, white males for promotion, decades after the incidents, or whether the narrowly tailored remedy would at most involve penalizing the discriminator and providing appropriate relief to the victim, and to explore race-neutral alternatives to increase minority representation.

3. Whether Hispanics should have been randomly included in promotion quotas.

4. Whether the inquiry into whether there is a strong basis in evidence to justify racial quotas is a question of law, not fact, subject to plenary review.

5. Whether all nine petitioners would have been promoted if promotions had been made in rank order, according to the law of mathematics.

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PETITION FOR A WRIT OF CERTIORARI

The McNamara petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit on issues of what constitutes a compelling governmental interest and narrowly tailored remedy under the equal protection clause, in a reverse discrimination case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 138 F.3d 1219 (7th Cir. 1998), and reprinted in the Appendix (App. 1). By order of April 21, 1998, and amended order of May 13, 1998, the Court of Appeals denied the petition for rehearing with suggestion for rehearing *en banc* (App. 30-31).

The opinion of the United States District Court is reported at 959 F.Supp. 870 (N.D.Ill.1997), and reprinted in the Appendix (App. 14).

JURISDICTION

On March 18, 1998, the Court of Appeals for the Seventh Circuit entered the judgment sought to be reviewed. By order of April 21, 1998, and amended order of May 13, 1998, the Court of Appeals denied the petition for rehearing with suggestion for rehearing en banc. This Court has jurisdiction under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

The present nine petitioners, who were white male Chicago Fire Department (CFD) lieutenants, were passed over for promotion to captain in 1991-92, for non-rank order (NRO) promotions of blacks and Hispanics. The underlying 1987 captains' test had adverse impact on whites, not blacks, and the NRO promotions caused the selection rate of whites to be only 50% of the selection rates of blacks and Hispanics. (R. 136-2, Pl. Exs. 21-23, pp. 3-4)

A. History of hiring and promotion in the CFD

1. Prior judicial determinations

On November 21, 1973, in the case of *United States v. City of Chicago*, 73 C 661, United States District Court Judge Thomas McMillan found that pre-Act hiring (before Title VII applied to cities in 1972) was not intentionally discriminatory. Judge McMillan found that the 1968 CFD written hiring test, was job-related and its purpose was not to discriminate against blacks and Hispanics, although it was more difficult for blacks than whites. He found that similar preceding hiring tests correlated with success in the academy. (R. 91. Tab B, p. 2-4)

On March 26, 1979, in the same case, United States District Court Judge Frank McGarr found:

> "The disparity between whites and minorities in hiring and promotion within the Chicago Fire department has been acknowledged and, as to the numbers of supervisors, is largely the effect of pre-Act effective-date conduct which, in the context of this case, is a legal nullity. *United*

Airlines, Inc. v. Evans, 431 U.S. 553 (1977)" (R. 91 Tab M, p. 5)

On October 17, 1979, Judge McGarr entered final summary judgment against the United States, on remand from *U.S. v. City of Chicago*, 573 F.2d 416 (7th Cir. 1978), finding no intentional discrimination and no adverse impact on promotion tests in use from 1964 to 1978. (R. 91 Tab 0)

Hiring

The 1950's

In the 1950's, the black witnesses called by the City of Chicago (City) testified that they had initially waived the opportunity to be hired by the CFD, because the job was low-paying and not worth the dangers. At that time, factory work paid more than the CFD. (R. 150, T. 447, 491-92, 544-45) (R. 162-7, Edwards Dep. 18-19)

The 1960's

Prior to the 1968 entrance test, the City engaged in extensive recruitment targeted at blacks and Hispanics, and provided them help in taking the entrance exam. (R. 136-1, Pl. Ex. 4, Pounian affidavit, p. 7 and attached photograph)

For the 1968 entrance test, as stated above, Judge McMillan found that the percentage of black applicants was 20%, however, many blacks did not pass the entrance test because the written general aptitude test was too difficult for them. He found that CFD hiring tests that preceded the 1968 hiring test correlated with success in

the academy. He found that the 1968 hiring test was job-related and did not discriminate against blacks and Hispanics. He found Title VII did not apply retroactively to the continued use of the 1968 list in 1973, after the effective date of Title VII. (R. 91. Tab B, pp. 2-4)

The 1970's

For the next entrance test, the 1974 entrance test, the City again targeted extensive recruiting at blacks and Hispanics. All of the recruiters were black and Hispanic. (R. 136-1, Pl. Ex. 4, pp. 4-5) (R. 149, T. 234 Orozco) (R. 136-1, Soto Dep. pp. 89-91) (R. 141, T. 112-13, 194-195 Joyce)

The City lowered the CFD's height requirement, and dropped the citizenship requirement. (R. 136-3, Soto Dep. 91) (R. 162-1, Def. Ex. 12).

For the 1974 CFD hiring test, the City ranked eligibles according to a physical fitness test. The reading test was lowered to a level between the 6th and 9th grades, graded pass/fail. (R. 91, Tab E, p. 6) (R. 136-1, Pl. Ex. 8b) (R. 162-1, Def. Ex. 20, bates no. 011574)

There was no hiring in the CFD from 1974 to 1976. There was no evidence that the CFD failed to hire during that time to avoid hiring minorities, contrary to a clearly erroneous finding by the district court (App. 26).

In 1977, the City certified the first class from the 1974 list. The City hired blacks and Hispanics under 50% voluntary hiring quotas, hiring 253 firefighters for a February and April class, of which 197 were blacks and Hispanics. Many of the blacks and Hispanics were

selected in non-rank order. (R. 136-1, Pl. Ex. 8b, 1974 hiring list; R. 91, Tab J (attached 1977 certification list) (R. 136-1 Pl. Ex. 8a excluded from evidence)[1]

Promotions

Time to promotion

The City's "Arimond letter" showed that from 1950-1979 blacks spent less time in rank before promotion than whites. (document sealed, R. 96 in 87 C 7295, excluded from evidence)

The City's own expert, Dr. Gerry Suchanek, showed that this trend continued after 1979. He stated his data was accurate starting with 1983 data. (R. 151, T. 771-71) (R. 162-3 Def. Ex. 61) He showed that in 1987, black lieutenants had an average of 13.8 years on the job, compared to 15 years for white lieutenants, and black captains had an average of 14.6 years on the job, compared to 20.6 for white captains. In 1991-92, black captains had an average of 16.8 years on the job, compared to 21.3 years for white captains. (R. 162-3 Def. Ex. 61)

Efficiencies used for promotion scores

Court documents filed in *United States v. City of Chicago*, 73 C 661, show that for 12 of the 17 promotion tests used between 1960 and 1978, blacks had better average efficiencies than whites. On the remaining 5 tests, the

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[1] Exhibits designated as "excluded from evidence" were either the City's own documents, a demonstrative exhibit created from the city's own documents, or court orders. None of these exhibits should have been excluded.

efficiency ratings did not have a statistically significant impact on blacks in the results of any test. (R. 136-2, Pl. Exs. 11, pp. 3-5 & Ex. 11a., p. 6, excluded from evidence)

The disparate impact of the efficiencies used for the 1978 lieutenants' test, referred to by the district court (App. 25), had no effect, since minorities were promoted anyway, through quotas. After the 1978 tests, efficiencies were no longer used in promotion scores. (R. 141, T. 183-84, 189) (R. 152, T. 861-865)

Promotion exams

There was no "past use of discriminatory promotion tests" contrary to a clearly erroneous finding by the district court (App. 23).

Of the 17 promotion examinations given between 1962-1973, only 7 had adverse impact in pass rates on minorities, and only 1 had adverse impact in selection rates, namely, the 1966 lieutenant test. (R. 91 Tab K, *U.S. v. City*, 573 F.2d 416, 419, n. 2) (A-83 to 84, stip. facts 14-17) (R. 136-1, Pl. Ex. 11, pp. 3-5, excluded from evidence)

The City made the first race-based promotions, on March 11, 1978, from the 1970 lieutenants' list and 1973 captains' list. (R. 136-1, Pl. Ex. 20, resp. #2) Judge Frank McGarr later found those lists were non-discriminatory. On October 17, 1979, Judge McGarr entered final summary judgment against the United States, on remand from *U.S. v. City of Chicago*, 573 F.2d 416 (1978), finding no intentional discrimination and no adverse impact on promotion tests from 1964 to 1973. (R. 91 Tab O)

In 1980, the City entered into a settlement order for racial quotas for future promotions. (R. 91, Tab Q)

On the 1979 lieutenants' list, the city promoted 61 blacks and 9 Hispanics out of order, causing severe adverse impact on whites. Before the quota promotions, there was no adverse impact on Hispanics in pass rates. (R. 162-2, Def. Ex. 37) (R. 136-2, Pl. Exs. 44) (R. 136-2, Pl. Exs. 43 excluded from evidence)

On the 1979 captains' list, the city promoted all the blacks and Hispanics on the list, including two blacks *who did not pass* the test. The NRO promotions caused the selection rate of whites to be about 50% of the selection rates of blacks and Hispanics. (R. 162-2, Def. Ex. 47) (R. 136-2, Pl. Ex. 21-23, pp. 3-4) (R. 141, T. 141-154, 158-161)

B. Incidences of uncongeniality

None of the City's black and Hispanic witnesses testified they were discriminated against in hiring or promotion, as the Seventh Circuit acknowledged (App. 9-10). Most of them rose up through the ranks, and many of the witnesses were appointed to exempt positions, including Commissioner, Deputy Commissioner, Deputy Chief, Affirmative Action officer, etc. (R. 136-2, Def. Ex. 37, pp. 20-38) (R. 149, T. 366)

The City's black and Hispanic witnesses had elite assignments, including special squads, the training academy, and the fire prevention bureau. (R. 150, T. 461, 464-65, 469-72, T. 473 Lewis) (R. 150, T. 511-513, 514 Del la Cerna) (R. 136-2, Def. Ex. 37, pp. 20-38). Two served as "Fireman Friendly", visiting schools. (R. 152, 910-911 Thompson) (R. 152, T. 957 Grand Pre).

No witness even mentioned retaliation and punishment, contrary to a clearly erroneous finding by the district court (App. 24).

No Hispanic witnesses had complaints.

Three black witnesses had complaints of racial slurs from CFD officials.

Around 1957, Elwain Parks, who is black, heard an officer use the "n" word. (R. 150, T. 600) In 1968, Francesco Del la Cerna, who is black, heard a captain use the "n" word. (T. 525-26)

Sometime in the 1970's, Commissioner Quinn remarked to James Winbush, who is black, not Hispanic, that Mexicans were too short to fight fires. He used the term "niggers" in the same private conversation. (R. 149, T. 374)

There was no evidence of uncongeniality by officials in the 1980's. In the 1980's, most of the City's black and Hispanic witnesses were high ranked officers, running the fire department.

Whites as well as blacks have been disqualified from hire for medical reasons, denied transfers, not allowed to act up, and given old equipment, contrary to clearly erroneous findings by the district court implying that these things only happened to blacks. (R. 149, T. 240-242, R. 153, T. 939-40) (R. 153, T. 1044-45, 1048, 1054) (R. 153, 935, 1045, 1049, 1055, 1064) (R. 153, T. 954, 1050, 1057) (App. 23-25).

REASONS FOR GRANTING THE WRIT

I

Isolated incidents of uncongeniality, remote in time, and unrelated to the decision-making process, were not a compelling governmental interest for promotion quotas decades later.

The central issue in a reverse discrimination case, as set out in *Richmond v. Croson*, 468 U.S. 469, 109 S.Ct. 706 (1989), is whether a city had a strong basis in evidence of past discrimination to justify race-based actions, examined under strict judicial scrutiny. The race-based actions must be a narrowly tailored remedy for the past discrimination. The city must explore race-neutral alternatives.

Evidence of discrimination that is remote in time will not support a compelling governmental interest for racial quotas. In *Brunet v. City of Columbus*, 1 F.3d 390 at 409 (6th Cir. 1993), the Court held that evidence profferred in 1989 that a city fire department had discriminated prior to 1975 was too remote in time to justify preferences, especially in light of the city's subsequent steps to improve its recruitment efforts.

Anecdotal evidence, which may prove individual claims of discrimination, will rarely, if ever, show a systemic pattern of discrimination, *Middleton v. City of Flint, Michigan*, 92 F.3d 396 (6th Cir. 1996).

Racial remarks unrelated to the decisional process are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decision maker. *Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1266 (7th Cir. 1993).

In the present case, the Seventh Circuit found that the promotion quotas in 1991-92 were a narrowly tailored remedy for uncongeniality that had dissipated at least ten years before. The Seventh Circuit found, without reference to any facts, that uncongeniality in the CFD had continued until sometime during the 1980's, however the City's minority witnesses were bosses by that time. They *were* "the people running the fire department" in the 1980's (App. 9-10).

There was no evidence of any connection between the low number of blacks in the department and the isolated incidents of uncongeniality long ago. There was no evidence of anyone not applying or quitting, or failing to be promoted, because of uncongeniality.

II.

The lawful remedy for isolated incidents of uncongeniality was not to pass over innocent, third-party, white males for promotion decades after the incidents; the narrowly tailored remedy would at most involve penalizing the discriminator and providing appropriate relief to the victim, and to explore race-neutral alternatives to increase minority representation.

The lawful remedy for isolated racial remarks was not to pass over innocent, third-party, white males for promotion decades later.

This Court held that individual instances of discrimination do not justify broad remedial relief. Without a pattern of discriminatory acts, if such individual instances occur, a city would at most be justified in penalizing the discriminator and providing appropriate relief to the victim, *Croson*, 109 S.Ct. at 729.

The appearance of a low percentage of minorities in the captain rank was obviously the result of quotas in the lower ranks and not the result of discrimination in hiring or promotion.

The City did not explore race-neutral alternatives to increase minority representation in the captain rank to reflect the growing number of minorities in the lower ranks, that dramatically increased since the 1970's due to hiring quotas and quotas in the lower rank of lieutenant. As a race-neutral alternative, the City could have given promotion tests more often, or developed an early retirement program.

III.

Hispanics should not have been randomly included in promotion quotas.

This Court held that Spanish and other ethnic groups should not be randomly included in race-conscious actions, *Richmond v. Croson*, 468 U.S. 469, 109 S.Ct. 706, 728 (1989).

The Seventh Circuit randomly included "Hispanics" in its finding about lack of congeniality by people running the fire department (slip. op. 8), with no basis in evidence.

The only two Hispanics who testified, former CFD Commissioner Raymond Orozco and Deputy Commissioner Peter Soto, had no complaints about the job whatsoever. Both were hired when they applied, rose to the rank of battalion chief, and were appointed to exempt

positions. Orozco rose to the very top. (R. 149, T. 204) (R. 136-3, Soto Dep. 5, 79) (Pl. Trial Ex. 37, p. 22)

Francesco Del la Cerna, who was African-American and Filipino, not Hispanic, testified that a comment against Hispanics was made to him when he was applying in 1955. However he testified the speaker was *not* any official in the fire department, contrary to a clearly erroneous fact finding by the district court. (R. 150, T. 494-497, 547-548) (App. 26).

Del la Cerna was hired when he applied, rose to the rank of battalion chief and to the exempt position of Deputy Fire Commissioner. (Pl. brief, p. 36) (Pl. Trial Ex. 37, p. 21)

IV.

The inquiry into whether there is a strong basis in evidence to justify racial quotas, is a question of law, not fact, subject to plenary review.

The central issue in a reverse discrimination case, as set out in *Croson*, is whether the municipality had a strong basis in evidence of past discrimination to justify race-based actions, examined under strict judicial scrutiny.

The third circuit has held this inquiry is a question of law, not fact, and therefore subject to plenary review:

> " 'whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling state interest for the municipality to enact a race conscious ordinance is a question of law' subject to plenary review."

Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia, 91 F.3d 586, 596 (3d Cir. 1996)

In the present case, the Seventh Circuit did not exercise plenary review, and appeared to defer to the district court, as indicated in the following key finding:

> " . . . no minority witness testified that he had applied and been turned down for an entry-level position and that the minority witnesses who had been hired and did testify had been promoted, in some cases to the very top. This was certainly evidence for the district court to consider. But there is enough contrary evidence to justify the judge's conclusion that until sometime during the 1980's the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics. This conclusion in turn justified an inference that the underrepresentation of blacks and Hispanics, in various ranks, including captain, was due, at least in part, to discrimination by the City (App. 9-10).

V.

All nine petitioners would have been promoted if promotions had been made in rank order, according to the law of mathematics.

The Seventh Circuit incorrectly affirmed the district court's finding that six of the nine petitioners would not have been promoted if promotions were made in rank order. This finding defies the law of mathematics and was clearly erroneous.

It is undisputed that the City made a total of 161 promotions, and there were five waivers in the top 166. If

promotions had been made in strict rank order, all candidates ranked up to and including rank 166, would have been promoted, since 161 plus 5 waivers equals 166. Those rank order promotions would include the six plaintiffs dismissed on standing grounds, who ranked as follows:

McNamara	#152
Sullivan	#153
Miller	#154
Lux	#157
King	#159
Dineen	#166

(R. 162-1 Joint ex. 9)

None of the above six plaintiffs, who were passed over by NRO promotions, were ever promoted, contrary to confusing language in the district court's opinion (App. 17).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

James A. McNAMARA, et al.,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, et al.,
Defendants-Appellees.

Nos. 97-1783, 97-1784.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 15, 1998.

Decided March 18, 1998.

Rehearing and Suggestion for
Rehearing En Banc Denied April 21, 1998.

Kimberly A. Sutherland (argued), Chicago, IL, for Plaintiffs-Appellants.

Sarah Vanderwicken, Despres, Schwartz & Geoghegan, Chicago, IL, J. Paula Roderick, Neal & Associates, Chicago, IL, Lawrence Rosenthal (argued), Jay M. Kertez, Office of the Corporation Counsel, Appeals Division, Chicago, IL, for Defendants-Appellees.

Before POSNER, Chief Judge, and COFFEY and RIPPLE, Circuit Judges.

POSNER, Chief Judge.

Nine white officers of the Chicago Fire Department brought this suit in 1993 against the City and City officials, charging racial discrimination in promotions. After a bench trial, the district judge gave judgment for the defendants and dismissed the suit. All of the plaintiff officers were lieutenants in 1987 and took the exam given

that year for promotion to captain. Three of them had done well on the exam only to be passed over in favor of black and Hispanic lieutenants who received lower scores. These three white officers were, however, promoted to captain a year later. The other six plaintiffs did not do as well on the exam and were denied promotion outright, rather than merely being delayed for a year.

We had a pair of similar cases several years ago (though with different plaintiffs), involving a challenge to affirmative action in promotions in the Chicago Fire Department, including promotions to captain. *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir.1993) (en banc). Those cases had been decided – prematurely, we ruled – on summary judgment; now we have a decision to review that was based on a full trial. But before getting to the merits, we address two jurisdictional issues.

The first, which actually is frivolous though urged by the appellants as their first ground of appeal, is whether the district judge had jurisdiction, after the appeal was filed, to replace "Chicago Police Department" with "Chicago Fire Department" in one sentence of the opinion. As this was the correction of a clerical error, it could be made by the district judge "at any time," Fed.R.Civ.P. 60(a), even after jurisdiction over the case shifted to this court by virtue of the filing of the notice of appeal. *Local 1545 v. Inland Steel Coal Co.*, 876 F.2d 1288, 1292 n. 4 (7th Cir.1989); *Stein v. Wood*, 127 F.3d 1187, 1189 (9th Cir.1997). Even if this were wrong, and the error could not be corrected while the case was on appeal, the existence of a trivial error, obviously merely typographical, in the district court's opinion would not be a ground for reversing the judgment.

The second jurisdictional issue is substantial, but also not dispositive of the appeal. It concerns the standing of the six plaintiffs who were denied promotion outright. They ranked between 152 and 166 in the scoring of the 1987 exam for captains. Had the City promoted in strict rank order, without any favoritism for members of minority groups, it would have promoted 143 of the examinees and reached number 146 (because three of the top 146 scorers waived promotion); no one ranking below 146 on the exam would have been promoted. It is true that the actual number of promotions made was not 143, but 161, and that the last promotion would have been 166 (because there were two more waivers) had promotions been made in strict rank order. But the additional 18 promotions (161 – 143) were made pursuant to the same affirmative action plan that was responsible for the favored treatment of which the plaintiffs are complaining. Had there been no favoritism, the six low-ranking plaintiffs would not have been promoted, because promotions would have stopped at 146 and the highest-ranking of these plaintiffs was as we said number 152.

A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41, 96 S.Ct. 1917, 1925-26, 48 L.Ed.2d 450 (1976); *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge*, 9 F.3d 1290 (7th Cir.1993). That appears to be (but, as we are about to see, may not be) the situation of these six

plaintiffs. The remaining plaintiffs clearly were hurt by the affirmative action plan, because they ranked in the top 146 but were passed over to make room for minority lieutenants. The harm was temporary, because they were promoted to captain a year later, and therefore limited; but obviously not so limited as to deprive them of standing.

But just as a person may recover damages for emotional distress caused by his having been denied due process of law, even though if he had received due process he would still have lost the case in which the procedural violation occurred, *Carey v. Piphus*, 435 U.S. 247, 263-64, 98 S.Ct. 1042, 1052-53, 55 L.Ed.2d 252 (1978), so it can be argued that a person denied a benefit on an invidious ground may obtain damages for emotional distress caused by that denial even if he would have been denied the benefit anyway. And *Price v. City of Charlotte*, 93 F.3d 1241, 1245-48 (4th Cir.1996), so holds. Neither the Supreme Court nor this court has had occasion to examine the question. The objection to the answer given by *Price* is that it enormously multiplies the number of potential plaintiffs in equal protection cases; persons who had not been harmed in the usual sense could nonetheless sue for damages resulting from the insult implicit in any denial to a person of the equal protection of the laws. But this is not the case in which to try to wrestle the issue to the ground. Since three of the plaintiffs have standing, the merits issue cannot be avoided, and in these circumstances we may elide the jurisdictional issue. *Steel Co. v. Citizens for a Better Environment*, ___ U.S. ___, ___, 118 S.Ct. 1003, 1013, ___ L.Ed.2d ___ (1998). And we may do so for the additional reason that, given the claim of

damages for emotional distress, the jurisdictional issue is not whether the plaintiffs have been harmed (Article III) but whether they should be allowed to sue for that harm (zone of interests). The latter type of jurisdictional issue ("prudential standing" as it is sometimes called) may be bypassed in favor of deciding the merits when the outcome is unaffected and the merits issue easier than the jurisdictional issue. *Id.*

So let us turn to the merits. The parties agree that minority lieutenants received favorable treatment on account of their race (in the case of the blacks) and their ethnicity (in the case of the Hispanics) and that such treatment is a denial of equal protection unless it can be justified under the demanding standard that goes by the name "strict scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236-37, 115 S.Ct. 2097, 2117-18, 132 L.Ed.2d 158 (1995). They further agree, as they also must under the cases, that one justification that passes muster under this demanding standard is that the favored treatment is necessary to remedy unlawful discrimination in the past by the entity conferring the favor. E.g., *People Who Care v. Rockford Board of Education*, 111 F.3d 528, 535 (7th Cir.1997). Whether other justifications are possible is unsettled, *United States v. Paradise*, 480 U.S. 149, 167 n. 18, 107 S.Ct. 1053, 1064 n. 18, 94 L.Ed.2d 203 (1987); compare *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 721-22, 102 L.Ed.2d 854 (1989) (plurality opinion); *Taxman v. Board of Education*, 91 F.3d 1547, 1557 (3d Cir.1996); and *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir.1996), with *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-14, 98 S.Ct. 2733, 2759-61, 57 L.Ed.2d 750 (1978) (opinion of Justice Powell), but this

court has held that at least in the area of policing and corrections it is possible to justify nonremedial affirmative action upon a showing – which must however be based on evidence rather than merely on conjecture – that such action is necessary to the accomplishment of important law-enforcement objectives. *Wittmer v. Peters*, 87 F.3d 916 (7th Cir.1996).

At argument there was some discussion of whether a similar justification might be available in the case of firefighters, who may lack credibility, and be denied cooperation, in minority neighborhoods if the firehouses in those neighborhoods have only white personnel. Cf. *Alexander v. Estepp*, 95 F.3d 312, 316 (4th Cir.1996); *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 213 (4th Cir.1993). But as the City presented very little evidence of this at trial, it is not available to support the judgment on appeal. Racial discrimination cannot survive challenge without compelling evidence; even highly plausible speculation will not do. *Id.* at 214; *Wittmer v. Peters*, *supra*, 87 F.3d at 918-19.

So the only available justification is the remedial one, and it requires proof both that the City engaged in racial and ethnic discrimination in the employment of firefighters in the past and that the remedy is narrowly tailored to the violation, which means, as a practical matter, that it discriminates against whites as little as possible consistent with effective remediation. *Shaw v. Hunt*, 517 U.S. 899, 907-11, 116 S.Ct. 1894, 1902-03, 135 L.Ed.2d 207 (1996); *Billish v. City of Chicago*, *supra*, 989 F.2d at 893; *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 91 F.3d 586, 596 (3d Cir.1996); *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir.1994). To assess the

validity of the remedy in this case requires us to review the evidence on both these fronts (past violation and tailored remedy), giving proper weight to the district judge's findings of fact – a precept the plaintiffs ignore.

Until comparatively recently the City employed very few minority firefighters relative to their proportion of the city's population. As late as 1974, only 4 percent of the firefighting force was black and only one-half of 1 percent was Hispanic (figures essentially unchanged from 1950, the earliest year for which there are statistics in the record), even though blacks and Hispanics accounted for a much higher percentage of the city's population. (Blacks alone were almost a third of the city's population in 1970.) Raw statistical disparities prove little; they certainly do not prove *intentional* discrimination. A glance at almost any occupation in the United States will reveal disparities, often stark, between the racial, ethnic, religious, and sexual composition of the occupation and that of the American population in general, and not all of these disparities are plausibly attributable to intentional, or for that matter unintentional, discrimination, let alone intentional discrimination by the particular employer that has been sued. Racial, ethnic, religious, and sexual identity are correlated with attitudes, accomplishments, tastes, experiences, aspirations, opportunities, educational background, and other aspects of personality and personal history that bear on eligibility and suitability for, and the choice of, a particular occupation. Some of the differences may of course be due to discrimination, but the only discrimination for which an employer is liable is the discrimination that *he* engages in.

The statistician who testified for the City tried to correct for some of the nonculpable factors that bear on occupational choice by comparing the racial and ethnic composition of people who applied for jobs with the Chicago Fire Department with the racial and ethnic composition of the city's population in the relevant age group, viewed as a control group. It turned out that at least in the case of blacks the composition of the applicant group was similar to that of the control group, indicating that in the early 1970s blacks were being *hired* at a lower rate than white applicants, since they were *applying* at a similar rate yet were underrepresented in the fire department. Even this, of course, was not decisive, for the whites might simply have had better aptitudes. Whites on average have more years of schooling than blacks, and this is important in many jobs – but not, so far as the record shows, in a firefighter's job, where no college is required and the entry-level firefighter's job does not, at least according to this record, require special skills, see also *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1554 (11th Cir.1994), let alone skills correlated with membership in particular racial or ethnic groups. We note, however, that the statistician's evidence does not suggest discrimination in the hiring of Hispanics, who until the middle 1980s applied for firefighters' jobs at a substantially lower rate than their percentage of the relevant age group.

In 1974, the City settled a discrimination suit by the federal government by agreeing to hire a much higher percentage of blacks and Hispanics. But immediately the City instituted a hiring freeze as a result of which no firefighters of any race were hired for three years. When

the freeze ended, the percentage of black and Hispanic firefighters was no higher than it had been in 1950, even though the black and Hispanic percentage of the population of Chicago had doubled.

In 1979, upon motion by the Department of Justice to enforce the consent decree, the district court issued a further order requiring preferential hiring of blacks and Hispanics. The Department also questioned the exam that the City had administered in 1978 for promotion to lieutenant and captain; the exam contained a large subjective component and had not been shown to test for the knowledge and skills actually required in a fire lieutenant or captain. Again the City settled. The City redid the exam; and it was the redone and presumably race-neutral exam that was administered to would-be captains in 1987. Because so few blacks and Hispanics had been hired in the 1960s and 1970s, and because it takes many years for a firefighter to work his way up to lieutenant – and only lieutenants are eligible for promotion to captain – in 1986 only 2.6 percent of the captains were black and only 1 percent were Hispanic, even though by this time a majority of the City's population was black or Hispanic.

There was also direct evidence of racial discrimination in the Chicago Fire Department up to and into the 1980s, much of it concerning the racial policies of senior officials of the department, including one Fire Commissioner. The plaintiffs point out that no minority witness testified that he had applied and been turned down for an entry-level position and that the minority witnesses who had been hired and did testify had been promoted, in some cases to the very top. This was certainly evidence for the district judge to consider. But there was enough

contrary evidence to justify the judge's conclusion that until sometime during the 1980s the people running the fire department endeavored with considerable success to make the department uncongenial to blacks and Hispanics. This conclusion in turn justified an inference that the underrepresentation of blacks and Hispanics in the various ranks, including that of captain, was due, at least in part, to discrimination by the City.

The groundwork thus was laid for justifying on remedial grounds the application of a plan for affirmative action to the results of the 1987 captains' examination. The exam itself is conceded to have been fair, and had promotions been made in strict order of rank on the exam 20 of the 143 lieutenants promoted would have been black (14 percent) and 5 would have been Hispanic (3.5 percent, though the figure in the record is a mysterious 4.7 percent). The affirmative action plan called for increasing the fraction of minority lieutenants promoted to captain to 20 percent black and 5 percent Hispanic, but for doing so with minimum adverse impact on whites. To this end, the City made the 18 additional promotions, for a total of 161, of which 31 were of black lieutenants and 9 were of Hispanic lieutenants. Because there were so few black and Hispanic captains before the new promotions, these promotions, though slanted in favor of the minority lieutenants, did not bring the racial and ethnic composition of the fire captains into conformity with the racial and ethnic composition of either the city population (corrected for age) or the fire department as a whole. In 1992, immediately after the completion of the promotions, the percentage of black captains was 10.8 percent and the percentage of Hispanic captains 3.6 percent. Had it not

been for the affirmative action plan, these percentages would have been 5.7 percent and 1.7 percent in a city the population (age adjusted for comparability) of which is, as we said, more than half black or Hispanic.

The increase in the number (as distinct from percentage) of black captains over what it would have been without the affirmative action plan was 11 and of Hispanic captains 4, and it could be argued that the City must demonstrate a compelling interest in such an increase. But that would be the wrong approach in a case in which the justification for affirmative action is remedial. The test is, rather, whether the increase is a plausible lower-bound estimate of a shortfall in minority representation among fire captains that is due to the fire department's intentional discrimination in the past. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1165 (6th Cir.1994) (en banc); *Peightal v. Metropolitan Dade County*, supra, 26 F.3d at 1558; cf. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 434-37, 96 S.Ct. 2697, 2703-05, 49 L.Ed.2d 599 (1976); *People Who Care v. Rockford Board of Education, supra*, 111 F.3d at 534. And we think it is. The result of the affirmative action plan was to boost the minority proportion of captains to 14.4 percent, which was still far below the minority proportion of the city's population and of the lowest rank in the fire department (29 percent minority). The percentage in the lowest rank may be inflated to some extent by affirmative action. But considering the history of discrimination by the City and the minimal educational requirements for being a firefighter, we think it a reasonable surmise (and no more is practicable, given the nature of the inquiry) that, had it not been for the City's discrimination against blacks and Hispanics in the

past, the percentage of black and Hispanic captains would be at least a third of the potential applicant pool; and that is all it is, even with the affirmative action challenged here.

It remains to consider the plaintiffs' contention that the doctrine of judicial estoppel barred the City from trying to prove that it had engaged in intentional discrimination in the past, since in earlier litigation it had, unsurprisingly, denied that charge. The doctrine provides that a party who prevails on one ground in a lawsuit cannot turn around and in another lawsuit repudiate the ground. *Davis v. Wakelee*, 156 U.S. 680, 689-91, 15 S.Ct. 555, 558-59, 39 L.Ed. 578 (1895); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427-28 (7th Cir.1993); *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp.*, 910 F.2d 1540, 1547 (7th Cir.1990); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir.1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212-13 (1st Cir.1987). If repudiation were permitted, the incentive to commit perjury and engage in other litigation fraud would be greater. *Chaveriat v. Williams Pipe Line Co., supra*, 11 F.3d at 1428. A party envisaging a succession of suits in which a change in position would be advantageous would have an incentive to falsify the evidence in one of the cases, since it would be difficult otherwise to maintain inconsistent positions. The doctrine of judicial estoppel requires, however, that the party sought to be estopped have obtained a favorable judgment or settlement (*Kale v. Obuchowski*, 985 F.2d 360, 361-62 (7th Cir.1993)) on the basis of a legal or factual contention that he wants to repudiate in the current litigation. Otherwise

it would be inconsistent with the rule that permits inconsistent pleadings. *Astor Chauffeured Limousine Co. v. Runnfeldt Investment Corp., supra,* 910 F.2d at 1548. The City did convince a district judge, in the first suit brought by the Department of Justice, that it had not discriminated against blacks and Hispanics during part of the period covered by the present litigation. But it abandoned that position on appeal and so never obtained either a favorable judgment or a favorable settlement on the basis of it. The doctrine of judicial estoppel is inapplicable.

The plaintiffs make other arguments, based mainly on evidentiary rulings by the district judge; but these do not have sufficient merit to warrant discussion.

AFFIRMED.

James A. McNAMARA, John J. Sullivan, Thomas R. Miller, Charles W. Lux, William T. King, Charles E. Dineen, Richard A. Graf, Henry T. Scavone and Paul B. Sobczak, Plaintiffs,

v.

CITY OF CHICAGO, a municipal corporation, Defendant.

No. 93 C 1098.

United States District Court,
N.D. Illinois,
Eastern Division.

March 18, 1997.

Kimberly Sutherland, Chicago, IL, for Plaintiffs.

Susan S. Sher, Corporation Counsel, Shona Glink, Asst. Corporation Counsel, Jay Kertez, Asst. Corporation Counsel, City of Chicago, Chicago, IL, for Defendant.

DECISION ON THE MERITS

CONLON, District Judge.

The hiring and promotional practices of the Chicago Fire Department have spawned more than two decades of civil rights litigation. In this case, nine white captains and lieutenants challenge the affirmative action promotion of sixteen black and nine Hispanic lieutenants to the position of captain. The plaintiffs claim their equal protection rights under the United States Constitution were violated by the challenged promotions.

A six-day bench trial was held. After considering the testimony, exhibits and arguments of counsel, the court

enters the following findings of fact and conclusions of law, as required by Rule 52(a) of the Federal Rules of Civil Procedure.

As a preliminary matter, the court adopts and incorporates the parties' stipulation of uncontested facts, as well as the now uncontested portions of the city's statement of contested facts in the joint final pretrial order.

THE 1987 CAPTAIN'S EXAMINATION

The following background facts are undisputed. The City of Chicago's Department of Personnel develops and administers promotional examinations for the Chicago Fire Department. Plaintiffs challenge the out of rank order promotions of twenty-five blacks and Hispanics on May 1, 1991 and April 1, 1992 from the results of fire captain examination # 68737. Plaintiffs are white males who passed the fire captain examination.

Only lieutenants in the Chicago Fire Department were eligible to take the captain's examination. The examination consisted of three parts: a written multiple choice test, an oral board interview and credit for seniority. The city's Department of Personnel used job content as a source of knowledge and skill to be tested. To define job content for the 1987 captain's examination, the Department of Personnel conducted a job analysis. The process used is detailed in "The Report on the Validation of the Fire Captain Examination of 1986." It is undisputed that the job analysis procedures used by the city in the construction of the 1987 captain's examination were professionally recognized and complied with the Equal

Employment Opportunity Commission Guidelines on Employee Selection Procedures.

After the job analysis was conducted, the tasks, knowledge, skills and abilities identified, and the source materials examined, a joint committee from the Chicago Fire Department and the Department of Personnel prepared the test.

Training sessions were conducted at city colleges prior to the administration of the examination. The Chicago Fire Department provided each applicant with source materials to study. These materials included fire department rules and regulations, citations to general orders, operating procedures, and bulletins.

The oral component of the examination was designed to measure and evaluate knowledge, skills and abilities that are important to the position of fire captain. The oral examination questions were also developed by a joint committee of Chicago Fire Department and Department of Personnel staff. The nine oral board raters who graded the oral examinations were commanders in the Chicago Fire Department; each candidate was evaluated by two of these commanders.

A total of 577 lieutenants applied to take the 1987 captain's examination: 496 were white (86%), sixty-three (10.9%) were black, and eighteen (3.1%) were Hispanic. A total of 543 lieutenants actually took the written component of the examination: 463 (85.3%) were white, sixty-three (11.6%) were black, and seventeen (3.1%) were Hispanic. Only 506 lieutenants then proceeded to take the oral component of the examination: 431 (85.2%) were

white, fifty-eight (11.5%) were black, and seventeen (3.4%) were Hispanic.

The results of the 1987 captain's examination were weighted 65% on the written component, 25% on the oral component and 10% on seniority. The passing score was 70; 341 of the candidates passed the examination.

A promotional eligibility list of the 341 lieutenants who passed the examination ranked the candidates in the order of their test results. Between October 16, 1987 and April 1, 1992, 161 lieutenants from the promotional eligibility list were promoted to captain: 121 were white, thirty-one were black, and nine were Hispanic. Of these 161 promotions, twenty-five were made on a non-rank order basis. Of the twenty-five non-rank promotions, sixteen were to black lieutenants and nine were to Hispanic lieutenants. Eligible candidates ranked 106, 115, 132, 162 and 165 waived promotion or were withdrawn for reasons unrelated to this case. It is undisputed that if promotions from the 1987 eligibility list had been made in strict rank order, all candidates ranked up to and including rank 146 would have been promoted.

Plaintiffs declined to stipulate that twelve promotions were made in 1992 to comply with the city's "wrap-around" agreement with the United States Department of Justice pursuant to a settlement agreement in another civil rights case. This group also included three additional minority out of rank promotions. However, the undisputed evidence established that promotions were given to all non-minority lieutenants who were passed over because of out of rank order affirmative action promotions. *See, e.g.*, Def.Ex. 8, 9. Plaintiffs ranked as follows

on the promotional eligibility list: James A. McNamara 152; John J. Sullivan 153; Thomas R. Miller 154; Charles W. Lux 157; William T. King 159; Charles E. Dineen 166; Richard A. Graf 136; Henry A. Scavone 138; and Paul B. Sobczak 139. Plaintiffs Graf, Scavone and Sobczak were each promoted to the rank of captain before the list expired, pursuant to the "wrap-around" agreement. The remaining plaintiffs were not promoted from the eligibility list, which expired shortly after April 1, 1992. *Id.*

STANDING

The city belatedly challenges the standing of plaintiffs McNamara, Sullivan, Miller, Lux, King and Dineen, all of whom ranked lower than 146 on the promotional eligibility list.[1] Because these plaintiffs would not have been promoted even if strict rank order had been followed, the city argues that they have failed to show any injury from the non-rank affirmative action promotions.

It is plaintiffs' burden to establish all elements of their claim under 42 U.S.C. § 1983 by a preponderance of the evidence. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78, 106 S.Ct. 1842, 1848-49, 90 L.Ed.2d 260 (1986). This includes the necessity of showing that plaintiffs have actually suffered a particularized and specific injury as a result of the city's conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351

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[1] It is unfortunate that the city did not raise this issue in a motion for summary judgment, as it would have narrowed the issues for trial and obviated the affected plaintiffs' inconvenience and burden in participating in this trial.

(1992). Plaintiffs have not done so. Rather, they respond that simply because there were a total of 161 promotions from the eligibility list and they ranked numerically higher than 161, they should have been promoted. However, plaintiffs ignore the undisputed fact that if strict rank order had been followed, no candidate ranked lower than 146 would have been promoted. In fact, all non-minority candidates passed over due to out of rank affirmative action appointments were in fact promoted under the "wrap-around" agreement (including the three remaining plaintiffs: Graf, Scavone and Sobczak). Accordingly, plaintiffs McNamara, Sullivan, Miller, Lux, King and Dineen were not denied promotions because of the out of rank affirmative action promotions, and lack standing in this case. Thus, the only question here is whether the delay in promoting Graf, Scavone and Sobczak constitutes a violation of the Equal Protection Clause.

CONSTITUTIONALITY OF AFFIRMATIVE ACTION

It is a fundamental principle that the Equal Protection Clause of the United States Constitution prohibits municipalities from discriminating on the basis of race or ethnicity. Plaintiffs contend that the twenty-five out of rank affirmative action promotions discriminated against them based upon the fact that plaintiffs are white.

To pass constitutional muster, race-based affirmative action must be strictly scrutinized to determine whether it serves a compelling governmental interest and whether it is narrowly tailored to further that governmental interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, ___-___, 115 S.Ct. 2097, 2116-17, 132 L.Ed.2d 158 (1995).

Racial and ethnic distinctions are inherently suspect and therefore require the most exacting judicial examination. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 291, 98 S.Ct. 2733, 2748-49, 57 L.Ed.2d 750 (1978). However, municipalities are not constitutionally barred from taking race-based affirmative action when it is necessary to remedy the lingering effects of discrimination against minority groups. *Adarand*, 515 U.S. at ___, 115 S.Ct. at 2117. As Justice O'Connor wrote in *Adarand*,

> Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." *Fullilove [v. Klutznick], supra*, [448 U.S. 448] at 519, 100 S.Ct., [2758] at 2795 [65 L.Ed.2d 902 (1980)] (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety's "pervasive, systematic, and obstinate discriminatory conduct" justified a narrowly tailored race-based remedy. *See United States v. Paradise*, 480 U.S., [149] at 167, 107 S.Ct., [1053] at 1064 [94 L.Ed.2d 203 (1987)] (plurality opinion of BRENNAN, J.) *id.*, at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in judgment); *id.*, at 196, 107 S.Ct., at 1079-1080 (O'CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.

Id.

COMPELLING GOVERNMENTAL INTEREST

A compelling governmental interest justifying affirmative action may be shown by the use of statistical evidence establishing discrimination plus a history of entry-level and promotional discrimination. *Erwin v. Daley*, 92 F.3d 521, 527 (7th Cir.1996) *cert. denied*, ___ U.S. ___, 117 S.Ct. 958, 136 L.Ed.2d 845 (1997). *Stuart v. Roache*, 951 F.2d 446, 448-49, 455 (1st Cir.1991); *Vogel v. City of Cincinnati*, 959 F.2d 594, 596-97, 601 (6th Cir.1992) (statistical evidence alone sufficient to show compelling governmental interest). The statistical and historic evidence presented by the city establishes that the Chicago Fire Department has openly and intentionally discriminated against blacks and Hispanics until at least 1979; decades of discrimination have caused a significant lingering overrepresentation of whites and a significant underrepresentation of blacks and Hispanics, particularly in the upper ranks, when the promotions were made from the 1987 captain's examination.

The Department of Personnel predicated its decision to make a limited number of out of rank affirmative action promotions on three independent grounds. Def.Ex. 6. First, the city was under a continuing obligation to comply with a 1980 consent decree entered by former Judge McGarr of this Court in a desegregation case brought by the United States Department of Justice. The decree required the city to pursue a goal of promoting blacks and Hispanics to substantially increase minorities at each promotional rank; each rank was to become more representative of the rank from which promotions were made. In July 1987, only 3% of the captains were black or Hispanic, while 13.5% of the lieutenants and 26% of the

firefighters/engineers were black or Hispanic. The city's Corporation Counsel was of the opinion that under these circumstances, adherence to strict rank order promotions would violate Judge McGarr's decree. *Id.* at 1.

Second, under an existing collective bargaining agreement, the city was required to follow promotion policies designed to achieve a level of representation at each rank as close as reasonably possible to 45% black and Hispanic, as quickly as possible. *Id.* at 1-2.

Third, wholly apart from Judge McGarr's decree and the collective bargaining agreement, Commissioner of Personnel Jesse E. Hoskins concluded that the city's commitment to equal opportunity required adoption of reasonable affirmative action measures to remedy the effects of past discrimination. In his letter to Fire Commissioner Louis Galante explaining the city's decision, Commissioner Hoskins observed:

> Although we have been working in recent years to overcome the effects of past discrimination, those effects are still clearly present. Based on 1980 census workforce availability figures, one would expect Blacks and Hispanics to comprise approximately 35% and 10% respectively, of each rank in the promotional sequence. The actual utilization figures demonstrate a sever under-utilization.
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> |---|---|---|
> | Lieutenants | 10.4% | 3.1% |
> | Captains | 2.1% | 1.03% |
> | Battalion Chiefs | 1.01% | 1.01% |
>
> The unfortunate reason for this underutilization is past discrimination by the City. Prior to the

> late 1970's, there was only minimal hiring of Blacks and Hispanics as Firefighters [the entry level position]. The discrimination in hiring has had its predictable effect on minority access to higher level positions . . . This problem was exacerbated by the past use of discriminatory promotion tests, *i.e.*, invalidated tests which had an adverse impact on minorities. These practices led the United States Department of Justice to bring suit against the City, which produced the consent decrees under which we now operate.

Id. at 2. The evidence adduced at trial fully supports Commissioner Hoskin's analysis.

It is undisputed that prior to September 1965, the Chicago Fire Department maintained racially segregated firehouses and companies. The uncontroverted evidence establishes that Commissioner Robert J. Quinn of the Chicago Fire Department ordered limited, token integration of certain firehouses only after widespread rioting on the westside in August 1965. The rioting occurred after the death of Dessie Mae Williams, a twenty-three year old black woman who was reportedly killed due to the negligence of white firefighters from an all-white firehouse located in a predominately black westside neighborhood.

Credible trial testimony established pervasive, intentional discrimination experienced by black applicants and firefighters since at least the 1950's. Many of the witnesses observed that black applicants were frequently disqualified during medical examinations for the stated reason of "flat feet" or "heart murmurs," which blacks viewed as pretextual. Only a few blacks were hired and sent to the fire department's training academy in classes that varied from seventy to over a hundred whites.

According to unchallenged testimony, there were never more than 205 black firefighters (out of several thousand firefighters) at any time prior to 1977. The very small number of black firefighters remained relatively fixed between 1950 and 1977, despite the steady increase in minority population during that period. Def.Ex. 63, ex. 4. The observed disparities between blacks in the Chicago Fire Department and blacks in the qualified and interested work pool greatly exceed two to three standard deviations and thus strongly suggest intentional discrimination. *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1414 (9th Cir.1991), *cert. denied*, 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed.2d 390 (1992); *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1376 (2d Cir.1991).

Entry-level black firefighters were then assigned to all-black companies or trucks usually under the direction of white officers who spent little time in the black firehouses. White firefighters were only assigned to black firehouses as punishment for disciplinary infractions. Black firehouses were situated in high frequency areas for fire calls, and were called upon to fight some of the most deadly fires. Nevertheless, the equipment furnished to black firefighters was generally older than that furnished to white firefighters called to assist at the same fires. Black firefighters who complained about working conditions were subject to retaliation and punishment. This was graphically illustrated by the experiences of the witnesses who attempted to route their complaints through proper channels.

Most of the minority witnesses personally experienced racially demeaning comments and conduct from

white personnel of the fire department, from former Commissioner Robert J. Quinn (1957-1978) to officers and other firefighters. The record reflects persuasive evidence of racial animus and hostility by the leadership, as well as the rank and file of the fire department, during Commissioner Quinn's administration.

Requests for transfer by black firefighters to firehouses closer to their homes were routinely denied. According to the persuasive testimony of former Fire Commissioner Louis Galante (1983-1989) and Deputy Personnel Commissioner Thomas T. Joyce, blacks fared poorly on evaluations because of the use of subjective efficiency ratings; blacks generally scored far below whites when rated for "efficiency" by white officers. This perception of unfairness was also common among black firefighters who testified at trial.

No training or preparatory materials were given applicants for promotional examinations. Before affirmative action orders in several previous civil rights cases, few blacks or Hispanics reached the top ranks of battalion chief and chief. Indeed, according to uncontradicted testimony, a black would not be promoted to these upper ranks unless another black vacated the position. Prior to 1974, there were only seven black battalion chiefs in the entire history of the fire department. Prior to the mid or late 1980's, there were never more than two black battalion chiefs at one time. Affirmative action prior to 1987 had a minimal impact on the observed racial disparities in the rank of captain. Relatively few blacks were promoted from entry-level firefighter to the position of lieutenant until the late 1970's. The length of time it has taken for blacks to be promoted from firefighter to lieutenant

has been significantly longer than that for whites. This was shown by reliable statistical evidence for the period 1973 to 1993 and by the actual experiences of the witnesses, who were consistently denied the opportunity to "act up" to officers' positions when a vacancy occurred. Blacks were thereby denied meaningful experience for advancement.

The presence of Hispanics was rare; there were less than twenty on the job in 1974. Former Fire Commissioner Raymond Orozco (1989-1996), who held the rank of captain in 1974, was the highest ranking Hispanic in the fire department at that time. One of the witnesses with an Hispanic name, Francesco de la Cerna, was told by a fire department officer that the department did not hire Mexicans and Puerto Ricans when he applied in the 1950's. The minimum height restriction prior to 1974, which the parties stipulate was not related to the job, evidences purposeful discrimination when viewed in the context of all the other evidence. *Dothard v. Rawlinson*, 433 U.S. 321, 328-30, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977).

Compelling and credible evidence establishes systemic discrimination existed in the Chicago Fire Department for decades. Open discriminatory practices pervaded all levels within the fire department until at least the late 1970's. Integration was only permitted to a limited degree under public pressure, such as the 1965 westside riots or to showcase a special unit with high public visibility. In order to evade a 50% minority hiring order effective for four years in a consent decree issued by another judge of this Court, the fire department simply froze hiring from 1974 to 1979. Def.Ex. 86-90. The

evidence showed that the hiring freeze was contrary to the fire department's needs and the public safety. A reasonable inference may be drawn that the management of the fire department under Commissioner Quinn considered the defeat of court-ordered integration far more important than the efficient functioning of a vital public service. As the result of years of discrimination and the 1977-1979 hiring freeze, blacks and Hispanics were substantially underrepresented in the lieutenant pool qualified for promotion to the rank of captain in the late 1980's.

In sum, the evidence supports the city's 1987 decision to utilize limited out of rank promotions to ameliorate the significant underrepresentation of minorities in the rank of captain. Based upon strong evidence of the lingering effects of purposeful discrimination over a long period time, the city had a compelling governmental interest in addressing the problem.

A NARROWLY TAILORED REMEDY

In deciding to employ out of rank promotions for the 1987 captain's test, the city expressly found that there were no other available means to accelerate the progress of significantly underrepresented minorities through the promotional ranks of the Chicago Fire Department. The city used race-neutral means to provide training and study materials for the 1987 captain's examination. The city sought a remedy that would not unduly burden non-minority candidates for promotion or result in the promotion of unqualified minorities. In his letter to Fire Commissioner Galante, the city's Director of Personnel stated:

> In view of the current 97% white composition of the rank of Captain, an argument could be made for the temporary use of a 50% minority promotion ratio. Although we considered selecting a 50% ratio, the lower goals of 20% Black and 5% Hispanic were chosen in order to ensure that our affirmative action efforts do not unduly burden other candidates for promotion. We also considered the qualifications of the individuals who will be promoted as a result of the affirmative action goals. First and foremost, **no one will be promoted as a result of affirmative action unless that person has been shown to be qualified by virtue of achieving a passing score on the [1987 captain's examination]**. . . . [E]xamination of the rank order test scores shows that there will be virtually no difference in test scores between those promoted as a result of affirmative action and those who would have been promoted were we to promote in strict rank order.

Def.Ex. 6 at 4 [emphasis added]. The affirmative action promotions were limited to the three-year life of the promotional eligibility list or until 150 promotions were made from the list. *Id.* The goals of the temporary plan were to be evaluated annually; the plan was designed to remove the effects of past discrimination, not to maintain racial balance after the effects of past discrimination were corrected. *Id.* And because of the "wrap-around" agreement with the Justice Department, all non-minority lieutenants who were by-passed for promotion because of affirmative action promotions were in fact also promoted before the eligibility list expired in 1992. Def.Ex. 9. Thus, the impact on third parties was minimized.

The burden on the three remaining plaintiffs was a delay of one year in their promotions. This delay was unfortunate for plaintiffs. However, the court cannot conclude that this delay was unreasonable or unduly burdensome under all the circumstances. The earlier out of rank promotions of twenty-five fully qualified blacks and Hispanics were not a violation of plaintiffs' constitutional right to the equal protection of the law. *United States v. Paradise*, 480 U.S. 149, 183, 107 S.Ct. 1053, 1072-73, 94 L.Ed.2d 203 (1987).

CONCLUSION

Plaintiffs have failed to provide any evidence that the city has engaged in unlawful race-based discrimination against whites. Overwhelming credible evidence establishes that the Chicago Fire Department engaged in intentional discrimination against minorities over several decades. A limited number of out of rank promotions to fully qualified candidates was a modest remedy for this unlawful conduct.

For the foregoing reasons, judgment is entered for the defendant City of Chicago and against plaintiffs James A. McNamara, John J. Sullivan, Thomas R. Miller, Charles W. Lux, William T. King, Charles E. Dineen, Richard A. Graf, Henry A. Scavone and Paul B. Sobczak.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 21, 1998

Before

Hon. Richard A. Posner, Chief Judge

Hon. John L. Coffey, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

JAMES A. MCNAMARA, et al., *Plaintiffs-Appellants,*	) Appeals from the) United States District) Court for the
Nos. 97-1783 & 97-1784	) Northern District of
v.	) Illinois, Eastern
CITY OF CHICAGO, et al.,	) Division.
Defendants-Appellees.	) Nos. 93 C 1098 & 93 C 3028
	) Suzanne B. Conlon &) James F. Holderman,) *Judges.*

ORDER

On April 1, 1998, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

April 21, 1998
AMENDED: May 13, 1998

Before

Hon. Richard A. Posner, Chief Judge

Hon. John L. Coffey, Circuit Judge

Hon. Kenneth F. Ripple, Circuit Judge

JAMES A. MCNAMARA, et al., *Plaintiffs-Appellants,*	) Appeals from the) United States District) Court for the
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ORDER

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* Hon. Joel M. Flaum did not participate in the consideration of the petition.